

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 05Sep2002

Case No.: 2001-BCA-2

In the Matter of:

JIMENEZ, INCORPORATED
Under Contract No. E-3973-2-00-82-15

APPEARANCES:

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For Contractor

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For Government

BEFORE: JOHN VITTON
Administrative Law Judge
RICHARD D. MILLS
Administrative Law Judge
DANIEL SARNO
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under the Contract Disputes Act of 1978, as amended, 41 U.S.C. §601, et seq (herein "the Act") and implementing regulations under 41 C.F.R. Parts 29-60. The Act provides for the resolution of disputes arising under federal procurement contracts made by the United States Department of Labor.

BACKGROUND

The Department of Labor operates a range of employment and training programs. In particular, the Department's Employment and Training Administration (herein "ETA"), funds the

Job Corps Program for disadvantaged youth. This includes the operation of residential centers where enrollees participate in intensive programs of education, vocational training, work experience, counseling and other related activities.

The ETA contracts for the construction, maintenance and repair of the buildings used by those centers. An ETA contracting officer oversees the procurement of construction services, and insures that the procurement process and the work complies with the Federal Acquisition Regulation, or FAR, and other pertinent requirements.

Under this system, a contractor can seek reimbursement, in addition to the contract price, by submitting a Request for Equitable Adjustment (herein "REA") to the contracting officer. A contractor who is dissatisfied with the contracting officer's disposition of an REA has the right to appeal to the department's board of contract appeals, which has the authority, pursuant to 41 C.F.R. Parts 29-60.103, to adjudicate such appeals.

The present case arises from an appeal by Jimenez, Incorporated, Contractor, of the Contracting Officer's decision to reject its request for an equitable adjustment. Jimenez, Incorporated requests an equitable adjustment for costs incurred in the course of performing roofing work at the Job Corps Center in Batesville, Mississippi. It asserts that the excess costs, difficulties, and corresponding delays experienced during the Batesville project were caused by the Government, particularly due to design defects and to discrepancies between design specifications and conditions at the work site. Jimenez's REA contains three parts, consisting of actual costs incurred by Jimenez, and the actual costs of its two subcontractors, ICS and ACI Building Systems.

The Department of Labor contends that : 1) Jimenez is not entitled to an equitable adjustment because the delays and excess costs incurred were due to its own poor performance under the contract; and 2) the Contracting Officer was correct in assessing liquidated damages in the amount of \$40,400, representing a completion date of 200 days beyond the substantial completion date specified in the contract.

A hearing was held by the Board of Contract Appeals in Memphis, Tennessee on November 27 and 28, 2001. At that time the parties were represented by counsel, and given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

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|----|--|--------------|
| 1. | Appellant (Jimenez/Contractor): | Nos. 102-105 |
| 2. | Appellee (Government/Department of Labor): | Nos. 1-8 |

The following witnesses testified at the hearing:

1. Hershel Millsaps – An employee of ACI Building Systems during the period of contract performance. He testified primarily as an expert on the standing seam metal roof designs and

his observations as to the Project Manager's, Ms. We Lin Chang's, field inspections. TR. pp. 35-143.

2. Alfred F. Graham – Jimenez site superintendent and certified installer for metal seam roof systems. He became the site superintendent for the project in October 1996 and continued through February 1997. He testified as to the problems encountered during performance of the contract and gave his opinion as to potential problems with the roof design as specified in the contract. TR. pp. 143-199.
3. Byron W. Knapp – Vice president and co-owner of ACI Building Systems. Mr. Knapp testified about delays in supplying the construction materials due to the contract specifications. TR. 199-208.
4. Kenneth Chambers – Chief Financial Officer for Jimenez. He was involved in the solicitation and bidding on this project. He testified as to the administrative portion of the contract, including the contract terms, correspondence during contract performance, invoice procedures, and payment history. TR. 220-292.
5. John Steenbergen – Chief of Division of Contract services. He was the Contract Officer for Contract No. E-5399-5-00-82-10. He testified about the contract performance and administration. TR. pp. 292-401.
6. Leonidas Diamantidis – Licensed Architect for P.B. Dewberry. He reviews the designs of architect/engineers for adequacy. Mr. Diamantidis assisted the Contracting Officer in reviewing the designs for the roofing system after the REA was submitted. He testified mainly in response to Jimenez's allegations of design defects in the contract.

Upon conclusion of the hearing, the record was closed. Post-hearing briefs and reply briefs were timely received from both parties. This decision is being rendered after having given full consideration to the entire record. Based on the record and the testimony adduced at the hearing, this Board concludes that Jimenez is entitled to a partial equitable adjustment. Additionally, this Board finds that the Government is entitled to part of its counterclaim for liquidated damages.

SUMMARY OF THE EVIDENCE¹

1. Contract No. E-5747-6-00-82-20 and Performance History:

In December 1995, Mr. John Steenbergen, Contracting Officer for the ETA, issued an Invitation for Bids for a contract to replace metal roof on three buildings at the Batesville Mississippi Job Corps Center. AF-1, T.9 p. 190. The work involved replacement of roofs, insulation, and

¹ The following abbreviations will be used in citations to the record: AX- Appellant's Exhibit; AF- Administrative File; DOL-Government's Exhibit; and TR - Transcript of the Proceedings.

acoustical ceiling systems in buildings Nos. 2, 3, and 4 of the Center. TR. 304-315. Jimenez was awarded the government contract on April 18, 1996 for the fixed price amount of \$461,023.00. Id. at 191. This price included the bid, plus alternative number one. AF-1, T.8 pp. 190-191. Jimenez subcontracted the material supply function to ACI Building Systems, Inc. (herein "ACI") and the installation work to Industrial Construction Systems (herein "ICS"). DOL-6, T. 1.

A Notice to Proceed was sent to Jimenez on April 30, 1996, confirmation was received on May 2, 1996, and a preconstruction conference was held on May 15, 1996. AF-1, T.8 p. 183. This meeting included representatives from Jimenez, the Project Architect/Engineer, Richard Grabhorn, and the Project Manager, We Lin Chang. TR. p. 297. Pursuant to the terms of the contract, the substantial completion date was established by Jimenez's confirmation as August 8, 1996, and October 3, 1996 for the closeout of construction.² AF-1, T.5 p. 136.

Jimenez submitted a schedule, dated May 29, 1996, that showed mobilization during the first week of June 1996 and roof work beginning on Building No. 3 on June 10, 1996. AF-1, T.5 pp. 102-103; 128-130. These submitted dates were not met, and Jimenez submitted revised schedules showing a start date of July 17, 1996 for Building No. 3. Id. at 103. According to the record logs and daily reports, Jimenez began working around the end of July and beginning of August. Id. at 103; DOL-6, T.5.

Progress notes indicate that on July 15, 1996, roofing materials began arriving on site, and primary construction on the roof began on July 29, 1996. Id. at 103. This delay was primarily due to ACI, the subcontractor and supplier of the materials. TR. pp. 75-98. On August 6, 1996, the Contracting Officer sent a cure notice to Jimenez based on a lack of adequate progress in the

²The Board notes that one of Contractor's arguments is that it was not made aware of an August 8, 1996 substantial completion date either through the contract documents or through correspondence from the government until said date approached during the contract performance. Additionally, the page containing the substantial completion date was missing from the solicitation/contract documents in the Administrative File given to this Board. See AF-1, T.10. The testimony from the Government is that the missing page, page two of a two-sided copy, was inadvertently omitted from the Administrative File submitted into evidence. TR. pp. 327-377. The Government produced an affidavit from Brenda Williams, the contracting officer who has custody of the administrative file on the contract at issue. Dept. of Labor's Post-Hearing Brief, Attch. 1 (Feb. 15, 2002). Ms. Williams attached the missing page to the affidavit. Id. She affirmed that all potential bidders on the project received a complete set of contract documents, including the page omitted from the administrative file. This omitted page provides that the substantial completion date is to be 112 days after Notice to Proceed is given.

This Board accepts her testimony that potential bidders, including Contractor, received the missing page containing the requirement for a substantial completion date in the Solicitation/Contract documents. Additionally, there is corroborating evidence in the notes following the pre-construction meeting that the substantial completion date was discussed in the Contractor's presence. AF-1, T.5 pp. 131-137. Therefore, after considering all of this evidence, the Board finds that Contractor either knew or should have known that a substantial completion date under the contract was set for August 8, 1996.

construction. AF-1, T.5 p. 104; TR. pp. 222-223. Jimenez replied on August 19, 1996, stating that 98% of materials were on site as of August 16, 1996, and that the required information about the schedule and materials would be submitted by August 19, 1996. AF-1, T.4, p. 48. On August 23, 1996 and August 27, 1996 the contract Project Manager, We Lin Chang, estimated that work had begun on the buildings and approximately 35 to 40% of the roofing project was complete. AF-1, T.4 p. 95.

On September 17, 25, and 26, 1996 the work site was inspected, and both the Architect's and Project Manager's reports indicated that 95% of the work was complete. AF-4, T.5 pp. 152-153. On September 18, 1996, the Project Manager requested an inspection consisting of a pre-final inspection on September 20, 1996 and a final inspection on September 26, 1996. AF-2, T.2, Item 13. During these inspections, it was determined that the work was not complete. AF-1, T. 6 p. 167. In particular, the inspection reports indicated that the quality of the work performed on the roofs was average to below average, and the roofs leaked. AF-1, T.5 pp. 91-95.

The original final completion date under the contract was October 3, 1996, 154 days after the Notice to Proceed was confirmed by Contractor. At this time, the project was not completed. During an inspection, conducted on October 4, 1996, the Architect/Engineer and the Project Manager estimated that approximately 95% of the project was completed. AF-1, T.5 pp. 69, 91. After the inspection, Jimenez submitted a pay request based on the percentage of completion as estimated by it and the Architect/Engineer, which is common procedure in the industry. TR. pp. 310 -312. However, based on the reports of the overall progress under the contract and negative inspection reports, Mr. John Steenbergen, the Contracting Officer, reduced the request for payment from 95% to 60% of the contract price. Id.; AF-1, T.6 pp. 140, 161-163. He testified that the contracting officer, based on recommendations and discussions with his project manager, has every right to disagree with the estimated percentage of completion. TR. pp. 310-312. Therefore, he reduced the amount to be paid to Jimenez based on his assessment that none of the permanent curbs were installed, and there was a considerable list of deficiencies to be corrected. Mr. Steenbergen testified that a letter was sent to Jimenez explaining the reduction. Id.; AF-1, T. 6, p. 159.

During this period, Modification No. 1 was added to the contract, which incorporated the provision of neoprene closures and added \$2,000.00 to the fixed price amount. This raised the final firm fixed price of the contract to \$463,023.00. AF-1, T.7, pp. 175-176.

On October 31, 1996, a final inspection report from the Architect/Engineer indicated that 98% of the roofing work was complete with punch list items. This included roofpanel replacements. AF-1, T.5 p. 84. Given that the final completion date had passed, the Government issued a unilateral modification to extend the period of contract performance. AF-1, T.7 p. 172. As of November 1, 1996, the project was 98% complete. Notations were made that the roofs continued to have major leaks, and progress was substantially slowing down. AF-1, T.5, pp. 84-88. At this time, Alfred Graham, Contractor's site superintendent, presented a design modification for the roof curbs that was accepted and eventually custom made. TR. pp. 149-151. Installation of these curbs began in December 1996. Id.

On February 26, 1997, the project was approved by the Architect/Engineer as “substantially complete,” with several punch list items. AF-1, T. 5, pp. 64-66; T. 6 p. 158. The Project Manager noted that the Contractor was making a “good faith” effort to complete the remaining punch list items. The final close out for the contract was reported as May 12, 1997. AF-1, T.7 pp. 172-173. At that time, the Contractor had been paid a total of \$462,923.00, which included the base price plus costs for approved modifications in the contract. AF-1, T.6 p. 140. On November 21, 2000, Jimenez submitted a formal claim to the Contracting Officer for an REA in the amount of \$125,590.30 and an extension to the contract period of 204 calendar days. AF-1, T.4 pp. 12-14. On February 12, 2001, Contracting Officer John Steenbergen issued his final decision, denying the claim in its entirety. AF-1, T.3 pp. 6-10. The decision was appealed, and on March 1, 2001 the Department of Labor Board of Contract Appeals issued its Notice of Receipt and Pre-hearing Order. AF-1, T.1 pp. 1-4.

2. Current Request for Equitable Adjustment

In this case, Jimenez, Contractor, requests an equitable adjustment in the fixed contract price on behalf of it and its subcontractors in the amount of \$105,872.15. This includes direct labor and material costs as well as mark-ups for labor and materials expended during the period that it alleges were due to the defective plans and specifications. AX-104.

3. Relevant Contract Provisions include the following:

GENERAL CONTRACT

Section G – Contract Administration Data

§G.16 – Substantial Completion

Substantial Completion is the stage in construction when the project, or a designated portion thereof, has reached a state of completion which would permit the occupancy and/or use by the Department of Labor for its intended function. AF-1, T.10 p. G-9.

§G.17 Contract Closeout

After the Certificate of Substantial Completion has been acknowledged by the Department of Labor, and the correction/completion of the new punch list items has been accomplished, the contractor should submit a Notice of Final Completion to the Department of Labor through the Architect/Engineer and to the satisfaction of the Department of Labor through the Architect/Engineer, requesting a final walk-thru inspection. AF-1, T.10 p. G-10.

Section H – Special Contract Requirements

48 C.F.R. §52.236-21 (Apr. 1984)

Alternative I (Apr. 1984)

§H.2 Specifications and Drawings for Construction

(a) requires writing for changes in shop drawings/specifications. Any adjustment by the Contractor without such a written determination from the Contracting Officer shall be at its own risk and expense. AF-1, T.10 p. H-1.

CONTRACT SPECIFICATIONS FOR THE STANDING SEAM METAL ROOFING SYSTEM (Attachment A)

§1300, ss. 1.1 (Part 1 – General)

Shop Drawings

The Contractor shall furnish the Architect with such promptness as to cause no delay in this work or the work of any other contractors, one sepia copy of the shop drawings as required for the various subheadings for the Architect's approval. Shop drawings of any other subcontractor should be reviewed and approved by each subcontractor where their contract work comes in contact with or interferes with that of another subcontractor. AF-1, T. 10 p. 1.

ss.1.1.1 The Architect's approval, however, shall not relieve the Contractor from responsibility for errors in shop drawings. Shop drawings are the instruments of the Contractor, not the Architect; the Drawings and Specifications shall always be final. AF-1, T. 10 p. 1.

ss. 1.2.1

Samples

It shall be the Contractor's responsibility to obtain materials at such time as to cause no delay to the project. No allowance for additional time nor substitution of approved materials will be allowed for Contractor's negligence in late ordering of materials. AF-1, T. 10 p.1.

§07414, ss. 1.4.2.1 (Part 1 – Submittals)

Preformed Standing Seam Roofing

Submit roofing drawings to supplement the instructions and diagrams. Drawings shall include design and erection drawings containing an isometric view of the roof showing the design uplift pressures and dimensions of edge, ridge, and corner zones; and show typical and special conditions including flashings, materials and thickness, dimensions, fixing lines, anchoring methods, sealant locations, sealant tape locations, fastener layout, sizes, and spacing, terminations, penetrations, attachments, and provisions for thermal movement.....AF-1, T. 10 p. 5.

§07414, ss. 2.4 (Part 2 – Products)

Accessories

Sheet metal flashings, gutters, downspouts, trim, moldings, closure strips, pre-formed crickets, caps, equipment curbs, and other similar sheet metal accessories used in conjunction with preformed metal panels shall be of the same materials as used for the panels. Provide metal accessories with a factory color finish to match the roofing panels. AF-1, T.10 p. 11.

APPLICABLE FEDERAL ACQUISITION REGULATIONS (FAR)

48 CFR §52.243-4 (Aug. 1987)

CHANGES

(a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes--

- (1) In the specifications (including drawings and designs);
- (2) In the method or manner of performance of the work;
- (3) In the Government-furnished facilities, equipment, materials, services, or site; or
- (4) Directing acceleration in the performance of the work.

(b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; provided, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.

(e) The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.

(f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract. AF-1, T.10 p. I-2.

48 CFR §52.243-7

NOTIFICATION OF CHANGES (Apr. 1984)

(a) Definitions.

"Contracting Officer," as used in this clause, does not include any representative of the Contracting Officer.

"Specifically Authorized Representative (SAR)," as used in this clause, means any person the Contracting Officer has so designated by written notice (a copy of which shall be provided to the

Contractor) which shall refer to this subparagraph and shall be issued to the designated representative before the SAR exercises such authority.

(b) Notice. The primary purpose of this clause is to obtain prompt reporting of Government conduct that the Contractor considers to constitute a change to this contract. Except for changes identified as such in writing and signed by the Contracting Officer, the Contractor shall notify the Administrative Contracting Officer in writing promptly, within ____ (to be negotiated) calendar days from the date that the Contractor identifies any Government conduct (including actions, inactions, and written or oral communications) that the Contractor regards as a change to the contract terms and conditions. On the basis of the most accurate information available to the Contractor, the notice shall state--

- (1) The date, nature, and circumstances of the conduct regarded as a change;
- (2) The name, function, and activity of each Government individual and Contractor official or employee involved in or knowledgeable about such conduct;

- (3) The identification of any documents and the substance of any oral communication involved in such conduct;

- (4) In the instance of alleged acceleration of scheduled performance or delivery, the basis upon which it arose;

- (5) The particular elements of contract performance for which the Contractor may seek an equitable adjustment under this clause, including--

- (i) What contract line items have been or may be affected by the alleged change;
 - (ii) What labor or materials or both have been or may be added, deleted, or wasted by the alleged change;

- (iii) To the extent practicable, what delay and disruption in the manner and sequence of performance and effect on continued performance have been or may be caused by the alleged change;

- (iv) What adjustments to contract price, delivery schedule, and other provisions affected by the alleged change are estimated; and

- (6) The Contractor's estimate of the time by which the Government must respond to the Contractor's notice to minimize cost, delay or disruption of performance.

(c) Continued performance. Following submission of the notice required by (b) above, the Contractor shall diligently continue performance of this contract to the maximum extent possible in accordance with its terms and conditions as construed by the Contractor, unless the notice reports a direction of the Contracting Officer or a communication from a SAR of the Contracting Officer, in either of which events the Contractor shall continue performance; provided, however, that if the Contractor regards the direction or communication as a change as described in (b) above, notice shall be given in the manner provided. All directions, communications, interpretations, orders and similar actions of the SAR shall be reduced to writing promptly and copies furnished to the Contractor and to the Contracting Officer. The Contracting Officer shall promptly countermand any action which exceeds the authority of the SAR.

(d) Government response. The Contracting Officer shall promptly, within ____ (to be negotiated) calendar days after receipt of notice, respond to the notice in writing. In responding, the Contracting Officer shall either--

(1) Confirm that the conduct of which the Contractor gave notice constitutes a change and when necessary direct the mode of further performance;

(2) Countermand any communication regarded as a change;

(3) Deny that the conduct of which the Contractor gave notice constitutes a change and when necessary direct the mode of further performance; or

(4) In the event the Contractor's notice information is inadequate to make a decision under (1), (2), or (3) above, advise the Contractor what additional information is required, and establish the date by which it should be furnished and the date thereafter by which the Government will respond.

(e) Equitable adjustments.

(1) If the Contracting Officer confirms that Government conduct effected a change as alleged by the Contractor, and the conduct causes an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether changed or not changed by such conduct, an equitable adjustment shall be made--

(i) In the contract price or delivery schedule or both; and

(ii) In such other provisions of the contract as may be affected.

(2) The contract shall be modified in writing accordingly. In the case of drawings, designs or specifications which are defective and for which the Government is responsible, the equitable adjustment shall include the cost and time extension for delay reasonably incurred by the Contractor in attempting to comply with the defective drawings, designs or specifications before the Contractor identified, or reasonably should have identified, such defect. When the cost of property made obsolete or excess as a result of a change confirmed by the Contracting Officer under this clause is included in the equitable adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of the property. The equitable adjustment shall not include increased costs or time extensions for delay resulting from the Contractor's failure to provide notice or to continue performance as provided, respectively, in (b) and (c) above. AF-1, T.10 pp. I-12, I-13.

48 C.F.R. §52.236-2 (Apr. 1984)

DIFFERING SITE CONDITIONS

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; provided, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

(d) No request by the Contractor for an equitable adjustment to the contract for differing site

conditions shall be allowed if made after final payment under this contract. AF-1, T.10 p. H-1.

48 CFR §52.236-3 (Apr. 1984)

SITE INVESTIGATIONS AND CONDITIONS AFFECTING THE WORK

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract. AF-1, T.10 p. H-1.

48 CFR §52.246-12 (Aug. 1996)

INSPECTION OF CONSTRUCTION

(a) Definition. "Work" includes, but is not limited to, materials, workmanship, and manufacture and fabrication of components.

(b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the contract conforms to contract requirements. The Contractor shall maintain complete inspection records and make them available to the Government. All work shall be conducted under the general direction of the Contracting Officer and is subject to Government inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract.

(c) Government inspections and tests are for the sole benefit of the Government and do not--

- (1) Relieve the Contractor of responsibility for providing adequate quality control measures;
- (2) Relieve the Contractor of responsibility for damage to or loss of the material before acceptance;
- (3) Constitute or imply acceptance; or
- (4) Affect the continuing rights of the Government after acceptance of the completed work under paragraph (i) below.

(d) The presence or absence of a Government inspector does not relieve the Contractor from any

(e) The Contractor shall promptly furnish, at no increase in contract price, all facilities, labor, and material reasonably needed for performing such safe and convenient inspections and tests as may be required by the Contracting Officer. The Government may charge to the Contractor any additional cost of inspection or test when work is not ready at the time specified by the Contractor for inspection or test, or when prior rejection makes reinspection or retest necessary. The Government shall perform all inspections and tests in a manner that will not unnecessarily delay the work. Special, full size, and performance tests shall be performed as described in the contract.

(g) If the Contractor does not promptly replace or correct rejected work, the Government may (1) by contract or otherwise, replace or correct the work and charge the cost to the Contractor or (2) terminate for default the Contractor's right to proceed.

(i) Unless otherwise specified in the contract, the Government shall accept, as promptly as practicable after completion and inspection, all work required by the contract or that portion of the work the Contracting Officer determines can be accepted separately. Acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or the Government's rights under any warranty or guarantee. AF-1, T.10 p. E-1.

LIQUIDATED DAMAGES – CONSTRUCTION

(a) If the Contractor fails to complete each separate part or stage of the work within the time specified in the contract for that part or stage, or any extension, the Contractor shall pay to the Government as liquidated damages the following amounts:

Liquidated Damages for each day of delay

\$200.00/day. AF-1, T.10 p. F-1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STANDARD OF REVIEW

As an initial evidentiary matter, this Board notes that cases before the Board of Contract Appeals are reviewed *de novo*. See 41 C.F.R. Parts 29-60.103; TPI International Airways, Inc., ASBCA No. 46462, 96-2 BCA P 28373, recon. denied, 96-2 BCA P 28602, affd., 135 F.3d 776 (Fed. Cir. 1998), cert. denied, 525 U.S. 874 (1998). Once a decision reaches the level of the Board, it is reviewed *de novo* and no presumption is given to the CO's determination as to factual and legal conclusions. See D & L Construction Co., Inc., AGBCA No. 96-207-1 (July 29, 1999), 00-2 BCA P 30926. Therefore, this Board will consider the Contracting Officer's testimony only to the extent that it relates to his duties as the Contracting Officer, his personal observations, and his discussions with contract personnel during the period of contract performance. The portions of his testimony relating substantively to his final decision, and the merits of his final decision, reproduced as AF-1, T.3 will not be considered by the Court.

BURDEN OF PROOF

This appeal contains claims by Jimenez, the general contractor. As the appellant, it must prove all of the claim's elements by a preponderance of the evidence. Where there are concurrent (government and contractor) causes of delay, the contractor must prove that the Government's cause was the sole and proximate cause of the delay, and resulting damages. See William F. Klingensmith, Inc. v. United States, 731 F.2d 805 (Fed. Cir. 1984); Hoffman Constr. Co. v. United States, 40 Fed. Cl. 184 (1998); Blinderman Constr. Co. v. United States, 529 Fed. Cl. 529 (1997); and Mega Constr. Co. v. United States, 29 Fed. Cl. 396 (1993). As an inherent part of this proof, Appellant must show that the delay affected the work on the critical path since only work on the critical path has an impact on completion. Hoffman Constr., 40 Fed. Cl. at 198; and Mega Constr., 29 Fed. Cl. at 425.

In the instant case, Jimenez, asserts that the Government's actions were the primary cause of the delays and problems encountered in performance of the contract at issue. Due to these delays, it contends that it is entitled to an equitable adjustment for its costs and the costs of its subcontractors. In particular, Jimenez asserts the reasons for the performance delays were the inaccurate site conditions, defective roofing designs provided by the Government, and improper inspections of roof panels. In defense to the Government's counterclaim for liquidated damages, Jimenez contends that the project was substantially completed, except for delays caused by the Government, on the close out date of the contract, October 3, 1996, thereby precluding an award of liquidated damages. For the following reasons, this Board finds both that Jimenez is entitled to part of its equitable adjustment claim, and that the government is entitled to a partial award for liquidated damages.

I. DELAYS IN CONTRACT PERFORMANCE

A. Differing Site Conditions

Jimenez first contends that the Government's drawings of the buildings and representations of the site conditions were materially different from the actual conditions on the work site. The FAR clause for differing site conditions, incorporated by reference into the contract, reads:

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ material from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; provided that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer. 48 C.F.R. §52.236-2 (Apr. 1984)

The Contractor must prove either that it encountered a latent physical condition, which was materially different from the conditions represented in the contract documents (Type I), or that it encountered an unusual or unknown condition materially different from those ordinarily encountered in such work (Type II). See *Id.* In either case, the condition must not have been discoverable by the contractor after a reasonable pre-bid investigation or inquiry. See Midwest Environmental Control, Inc., LBCA No. 93-BCA-12.

In this case, Hershel Millsaps, employee of ACI, testified that he observed several discrepancies between the original drawings for the project and the actual site conditions. He stated that most of these conditions would not have been apparent until the project began and the roof was removed from each building. See TR. pp. 35-60. In particular the purlins, the anchoring system for the roof, were not located in the correct places. See *Id.* at 43-46. He opined that the difference in placement of the purlins required major changes, since the contract called for a new standing seam metal roof, as opposed to the original ribbed roof system. See *Id.* at 35-45. Additionally, Mr. Millsaps testified that the ribbed roof had a different substructure support system, requiring different types of parts in order to avoid excess penetrations and leaks. See *Id.* at 35-45. He added that in addition to the parts of the roof being in different places, there were also discrepancies in the original measurements, such as the ridge panel measurements, that required adjustment to accommodate the new roof design. See TR. pp. 35-60.

This Court finds that Mr. Millsaps' testimony is generally credible regarding the site conditions at the beginning of construction, since he visited the work site on a daily basis. Additionally, he testified credibly that he frequently works with the roofing system at issue in the present case and is familiar with the conditions necessary for a successful installation. The

conditions described by Mr. Millsaps are latent, because the original drawings do not show the substructure of the building, and the discrepancies are not apparent from a visual inspection. *See* Drawing No. A-10, A-11. However, this Court finds for the following reasons that these conditions are not Type I conditions, entitling the Contractor to an equitable adjustment..

First, Mr. Leonidas Diamantidis, a licensed architect, testified that the discrepancies between the location of the purlins and other substructure items would not have been a material change or required major, time-consuming alterations, to the installation of the roof system. *See* TR. pp. 401-420. Additionally, he noted that the measurements given on the original drawings were actually minimum, not exact measurements. *See* Id. at pp. 407-409. Even considering the fact that Mr. Diamantidis never visited the work site, as a licensed architect he would be able to sufficiently compare the described “inconsistent” site conditions with the original drawings and interpret the measurements given for the buildings. Given his qualifications for reviewing designs, this Board takes his interpretation of the discrepancies as determinative. Therefore, this Court finds that the Contractor has failed to prove that the site conditions encountered at the commencement of construction were “material” to the degree that it was entitled to an equitable adjustment on the basis of delay or excess materials costs. Additionally, since the measurements in the

original drawings were “minimum” dimensions, a discrepancy between the site measurement and the drawing measurement will not be considered a site change governed by the Differing Site Condition clause of the contract.

Second, in order to prove entitlement to an equitable adjustment on this basis, the contractor must also prove that excessive costs were solely attributable to the materially different subsurface or latent conditions within the contract site. *See Space Corporation v. United States*, 470 F.2d 536 (Ct. Cl. 1972); *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (en banc). In both the correspondence during contract performance and the testimony at the hearing, there were repeated references to delays at the beginning of the project. Hershel Millsaps and Byron Knapp, both employees of ACI, testified that these delays were due to difficulties ACI was having in supplying materials to the job site. *See* TR. pp. 60-80; 204-208. John Steenbergen, the Contracting Officer, also stated that he was made aware, through the Project Manager, of the lack of progress at the work site. *See* TR. pp. 306-315. Correspondence from Jimenez to ACI and from the Project Manager to Jimenez from June 1996 through July 1996 corroborates the testimony at hearing that the initial problems centered on ACI’s failure to supply materials. *See* AF-1, T.4 pp. 38-39; DOL-6, T. 2, 3. Given this evidence, the Board finds it more likely that the failure to secure materials was the sole cause for the delay, as opposed to the minor discrepancies in the drawings. Therefore, Jimenez has failed to prove a causal link between the on site inconsistencies and the initial delay in contract performance.

Finally, even assuming that the conditions were materially different from those described in the contract and caused the delays in construction, the Contractor failed to prove that it placed the Contracting Officer or any of his representatives on notice of the discrepancy. Under the FAR

regulation, cited above, Jimenez was required to give notice of these conditions to the Contracting Officer, John Steenbergen. *See* 48 C.F.R. §52.236-2 (Apr. 1984). After examining the progress reports and correspondence, this Court finds no evidence that Jimenez or its supply subcontractor, ACI, ever put Mr. Steenbergen on notice of these alleged discrepancies. Mr. Millsaps even conceded that no notice, either verbal or written, was given to the government's on site personnel, the Architect/Engineer or the Project Manager. *See* TR. pp. 50-60. When questioned on the issue, Mr. Millsaps stated in relevant part that:

Q: Did anybody at the government approve these changes?

A: Not at that time, because we – in this particular situation we didn't have time...

TR. p. 58.

Additionally, the Architect/Engineer was not informed of any additional work because of the measurement discrepancies in the ridge/peak area and the different locations of the purlins because, "we could not do it and wait on his determination..." TR. p. 58

While Mr. Millsaps later stated that the changes were formally approved by the A/E, there is no contemporaneous documentation in the record supporting his claim. Given that the Architect/Engineer on this project was very thorough in his reports, this Board finds insufficient evidence that the Architect Engineer, Project Manager, or Contracting Officer was put on notice for the changes in the onsite conditions. Therefore, even if these changes would qualify as Type I Different Site Conditions, the Contractor is not entitled to an equitable adjustment for either excess materials or performance delay.

B. Defective Design

The main basis of Jimenez's REA centers on what it alleges to be defective design specifications under the contract for the standing seam metal roof system. Jimenez claims entitlement to an equitable adjustment on these grounds, because the defective specifications for the roof curbs and other roof panel accessories caused excess costs, labor, and performance time for Jimenez and its subcontractors.

Pursuant to the contract, Jimenez, as Contractor was required to provide roof panels and accessories. *See* AF-1, T.10. These accessories consisted of sheet metal flashings, gutters, downspouts, trim, moldings, closure strips, pre-formed crickets, caps, equipment curbs, and other similar sheet metal accessories used in conjunction with preformed metal panels shall be of the same materials as used for the panels. These accessories were to have a factory color finish to match the roofing panels. *See* Id.

The specifications for the accessories at issue, the flashings, soldering and roof curbs are contained in Drawings Nos. A-10 and A-11. As an initial matter, this Board finds that the contract specifications are more like design specifications, as opposed to performance specifications. Performance specifications give the contractor a design, and the contractor has to adapt it to existing

conditions onsite. Design specifications, on the other hand, lay out the materials to be employed and the manner in which the work is to be performed. J.L. Simmons Co. v. United States, 412 F.2d 1360, 1362 (Ct. Cl. 1969). Leonidas Diamantidis, the architect who reviewed these specifications on behalf of the Government conceded that the specifications, while they do allow some discretion on the part of the contractor, are more design-like in nature. *See* TR. pp. 425. After examining the contract specifications, this Board concludes that these specifications contain both the installation method and list the materials to be used for the standing seam metal roof system. *See* AF-1, T. 10. Therefore, the specifications will be considered design specifications.

Pursuant to U.S. v. Spearin, 248 U.S. 132 (1918), the government warrants that the design specifications it issues in connection with a solicitation for fixed price bids are 1) accurate; 2) complete 3) workable 4) biddable and that, 5) if followed, satisfactory results will be achieved. The government warrants the performability of the design specifications that it issues. Neal & Co., Inc. v. U.S., 36 Fed. Cl. 600, 627 (1996), *aff'd*, 121 F.3d 683 (1997). If the design specifications are not workable as given in the contract, a contractor is entitled to an equitable adjustment based on excess costs in performing the contract to the government's satisfaction. *See Id.*

The first allegation of defective design is the soldering requirement contained in the specifications. *See* A-11, Detail No. 2. Mr. Millsaps testified that soldering the components, primarily the flashing, in the roofing systems would destroy the paint finish, in violation of the paint specifications. The end result would void the warranty. *See* TR. p. 68. Mr. Diamantidis, after reviewing the contract specifications, agreed that soldering the flashing and other components was a problem for that same reason. *See* TR. pp. 406-408. However, Mr. Diamantidis stated that the soldering was only a problem because of the material that Jimenez used. *See Id.* He stated that the specifications gave the contractor an option to use one of two different types of materials on the roof, one of which might be compatible with soldering. *See Id.*

While Mr. Diamantidis opined that Jimenez could have used a material that was compatible with soldering, he failed to name this specific appropriate material. Additionally, he failed to testify whether the material compatible with soldering was one of the materials listed under the specifications given in the contract. Given that the design specifications as to paint and materials were fairly detailed, it was incumbent on Jimenez to follow the specifications as given. Merely stating that Jimenez could have used another material allowing soldering is insufficient to clarify his own testimony that soldering the material, as specified in the contract, "was a problem" in the specifications. *See* TR. p. 408. After considering testimony from Hershel Millsaps and Leonidas Diamantidis, as well as the contractual language, this Board finds that the contractual specification, requiring soldering of roof components, was defective, because the procedure would have destroyed the paint finish on the products and voided the warranty. *See* AF-1, T. 10 §07414 pp. 9-10 (Attachment A). Therefore, Jimenez has sufficiently proven a design defect with respect to the soldering specification.

Jimenez also alleges a design defect involving a ridge cap on one of the buildings. The measurements and substructure near the ridge cap, allowed for a large gap in the substructure. Mr.

Millsaps testified that installing the roof panels using the measurement specifications would cause damage to the roof panel when walked on or inspected, and presented a safety hazard for maintenance personnel due to the lack of substructure support under the panels. *See* TR. 101-110. Mr. Diamantidis testified that the design of the ridge cap should have been a workable design if the area only had to support its own weight and was inaccessible. *See* TR. pp. 442-445. He did concede that these specifications and measurements for the ridge, as given, posed a safety hazard to personnel walking on the roof. *See* Id. However, Mr. Diamantidis also testified that this was one of the areas in which the specifications were performance-like in nature. *See* Id. Specifically, the measurements relating to the ridge cap area were minimum, not exact, measurements to be followed. *See* Id.

Given this testimony, this Court finds no evidence of a design defect regarding the ridge cap specifications. It is a logical from the language of the contract specifications that after taking accurate measurements of the area, Jimenez was required to install necessary accessories for the ridge/peak area in light of the approximate measurements of the peak area and in a manner acceptable to the government. None of Jimenez's witnesses testified that they were unable to fix the problem, only that they had to alter their original plan to do so. According to Alfred Graham, the site superintendent, Jimenez eventually installed a ridge cap wide enough to allow support consistent with the contract specifications, and acceptable to the government. *See* TR. pp. 189-195. There is no evidence, either in correspondence or testimony, that the final product of the ridge cap was outside of the specifications and estimated measurements for the area. Therefore, Jimenez has not sufficiently proven a design defect with respect to the specifications involving the ridge cap.

Jimenez's primary allegation of a design defect rests with the roof curbs. This Court finds merit in this claim. First, the contract specifications called for a flashing design around existing roof curbs in order to effectively install the roof panels. *See* AF-1, T. 10; TR. pp. 65-80, 148-160; According to Jimenez's site superintendent, the roof curbs required to be wrapped with the flashing material under the contract specifications were non-existent. *See* TR. pp. 145-150. Additionally, there was no original curb design in the specifications. *See* TR. p. 63. Progress notes and reports indicate that Jimenez had to flash around round, rectangular, or square roof penetrations with no curb in order to conform to the contract specifications. *See* TR. pp. 63-65; AF-1, T. 5, pp. 91-97, 103-104. Both Hershel Millsaps and Alfred Graham, both onsite, testified that this method of flashing did not work from the very beginning. *See* TR. pp. 63-65; 141-150; 157-160. Jimenez employees layered flashing and caulking around the areas where curbs were required. *See* Id. This continuous layering of caulking and flashing provided more penetrations for leaks, and resulted in an increase in water on the roof. *See* Id.

Mr. Graham testified that the lack of progress with the roof installation was due to the design specifications relating to the flashing. Since the mere flashing of the area was not working, he stated that eventually custom made roof curbs were designed in order to stop the leaks. *See* TR. pp. 143-167. Additionally, crickets, used to divert water around the curbs, had to be supplied to prevent damming of the water in the curb area. *See* Id. at 60-80. Mr. Millsaps testified that in his experience with the standing seam metal roof system, the flashing called for in the contract specifications would have never produced an acceptable roof. *See* Id. Both of these witnesses testified that the custom

designed curbs and installation of the crickets were major and material changes from the design in the original specifications.

Additionally, there is no language in the contract specifications requiring that Jimenez supply roof curbs. Since the specifications list several accessories in detail, including pre-formed crickets, this Board concludes that the Contractor was not required to supply custom-made roof curbs as part of the installation. *See* AF-1, T.10 p. 11. From the submitted evidence and testimony, it is likely that the design specifications and drawings that the installation of the roofing system anticipated the existence of actual roof curbs on the buildings. Even Mr. Diamantidis, while opining that the design was workable, never visited the site and was therefore unable to ascertain the actual existence of roof curbs on the building at the commencement of the project. 434-440. Therefore, this Board finds that he could not accurately compare the compatibility of the design with the buildings.

From the many reports of leaks and problems, it is apparent that while the roof design may not have been defective in itself, it was obviously not acceptable for the buildings at issue in this case. From the testimony at the hearing this Board, concludes that the roof leaks and problems in the installation stemmed from the fact that the buildings did not have the requisite roof curbs, as assumed in the original drawings. The specifications required “curb wraps,” which were not curbs but flashing, or wrapping, existing penetrations in the roof. *See* TR. pp. 60-80. While this Court does recognize Mr. Diamantidis’ expert qualifications for reviewing designs, it is equally obvious from the extensive roof leaks that the design, as applied to these buildings, was unworkable. *See* AF-1, T. 5 pp. 91-94; 77-82. The Jimenez witnesses testified that Jimenez and its subcontractors attempted to install the roofing system based on the contract specifications. This evidence is uncontradicted, as the government did not produce any of its on site representatives, the Architect/Engineer and the Project Manager, to testify otherwise. Since these witnesses were under the Government’s control, a negative inference will be drawn that the witnesses would have not testified in the Government’s favor. As such, the Board concludes that the design specifications, as relating to the “curb wraps,” were defective.

Since Jimenez alleges that it was required to make changes to the design specifications in the contract due to defects, this issue falls under the Notice of Changes clause of the contract. The FAR Changes clause, incorporated into the contract at issue, provides that the Contracting Officer can make written changes to work within the general scope of the contract. *See* 48 CFR §52.243-4 (AUG 1987). This includes changes to the specifications (including drawings and designs), method or manner of performance of the work, or directing acceleration in the performance of the work. *See* Id.

Under this clause, if any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, the Contractor is entitled to an equitable adjustment and the Contracting Officer is to modify the contract in writing. *See* Id. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications. *See* Id.

If a contractor discovers a design or specification defect under this clause it is supposed to notify the Contracting Officer of a possible change or modification to the contract. *See Id.* This requirement places the government on notice of a possible design defect and the need for a formal modification. See Space Corporation v. United States, 470 F.2d 536, 538 (Ct. C. 1972). In the present case the Contracting Officer testified that from a practical standpoint, minor problems, not affecting the cost of the contract, might be resolved by the Architect/Engineer or Project Manager. *See TR.* 295-320. However, Mr. Steenbergen testified that he, as the Contracting Officer is the one who approves changes affecting either the cost or scope of the contract. *See Id.*

First, if Jimenez proceeded with the soldering specifications in the contract, it would take the chance of either voiding the warranty or completely switching materials for the roof. Either option would change the cost of the contract. However, there is no indication in either Mr. Graham's or Mr. Millsaps' testimony that either Jimenez or ACI put any of the government representatives on notice of such a defect. While they testified that complaints were made about the soldering requirement, there's no contemporaneous documentation of notice in the progress reports. *See TR.* pp. 110-115. Since the Project Manager was closely monitoring the project, due to the extensive delays, it is logical that there would be a notation about the soldering problems if the Project Manager or Architect/Engineer would have know about the project. Additionally, a change such as this would require submittals of the changes and a formal modification of the contract by the Contracting Officer. Neither of these items are present in the administrative file. Therefore, this Board concludes that Jimenez and its subcontractors modified the method of installation without formal approval or requesting a contract change. As a result, sufficient notice of the defect was not given, and Jimenez modified this design defect at its own expense.

As to the design defects relating to the "curb wraps," Jimenez's witnesses testified that the problems with the "curb wrap" specifications were major and heavily affected the construction process. Mr. Millsaps testified that problems with the curb wrap specifications surfaced almost immediately after substantial construction began on the roofs. *See TR.* pp. 60-85. Additionally, Mr. Graham, who began working on the site in October 1996 verified that there were consistent problems with the attempts to install flashing in a way that would prevent leaks in the roofs. *See Id.* at 144-150. However, while these witnesses testified that this was a major, ongoing concern for Jimenez and its subcontractors, there is no evidence that any notice was given to the government representatives on site, much less the Contracting Officer. Mr. Steenbergen testified that he was never notified of problems with the roof curbs, nor did he receive a change request. *See TR.* pp. 300-310. Additionally, there are no notations in either the Architect/Engineer's reports or the Project Manager's reports regarding any alleged design defect in the curbs. Without contemporaneous documentation in the progress reports, which are detailed, this Board will not assume that the government had notice of the design defects requiring the construction of roofing curbs for the entire performance period of the project.

On November 11, 1996, Jimenez did present acceptable submittals for the custom made curbs that were used in the project. These designs were approved by the Architect/Engineer at the site. *See DOL-6, T. 7* (November 1996). However, while the Project Manager, Ms. We Lin Chang

did note in her reports that Jimenez submitted drawings for the roofing curbs prior to November 11, 1996, there are no concurrent allegations of a design defect in the original specifications. Therefore, there would be no way for Ms. Chang to ultimately communicate the issue of a design defect to Mr. Steenbergen, the Contracting Officer. As such, the mere submittals of a new design would not be notice by itself. However, Mr. Graham testified that he communicated the issue of the roof curbs and failure of the original design to both the Architect/Engineer and the Project Manager. *See* TR. pp. 157-160. Taken together with the documented submittals and approval, this Board finds that the Government should have been sufficiently on notice of a contractual change based on defective specifications when Mr. Graham's submitted drawings for the roof curbs were approved on November 11, 1996.

C. Inspections

Jimenez also asserts that it was denied the opportunity to repair scratches, dents, and other damage to the factory painted surface on the roof panels. As a result, the acquisition of new roof panels, as opposed to repairing the damaged panels, caused delay and expense to the project. Additionally it claims

that the Project Manager, Ms. We Lin Chang caused additional delay and added expense to the project by arbitrarily inspecting and rejecting roofing accessories, specifically the neoprene closures.

Roof Panels

Under the specifications relating to the roof panels, each panel is to be delivered, stored and handled in a manner to prevent damage or deformation. *See* AF-1, T. 10, §07414 ss. 1.7, pp. 9-10 (Attachment A). Additionally, the panels are required to be "plumb and true without oil canning, dents, ripples, abrasion, rust, staining, or other damage detrimental to the performance or aesthetics of the completed roof assembly." *See* Id. at §07414 ss. 3.8; AF-1 T.10, p. 16. After several inspections, over 80 roof panels were ordered to be replaced. *See* TR. pp. 75-80; AF-1, T.5 pp. 80-82.

Ms. We Lin Chang, the Project Manager, was responsible for inspecting and approving the roof panels during her site visits. Mr. Chambers, Jimenez's Chief Financial Officer stated that according to Ms. Chang's site reports, in September 1996 and October 1996, she estimated that approximately 5-7 panels needed to be replaced. *See* TR. 253-255; DOL-6, T. 3 pp. 1-4 (October 1996). At the end of October and November 1996, both of these inspections called for over 80 panels to be installed. *See* DOL-6, T. 4 (November 1996). Jimenez's witnesses, Mr. Millsaps and Mr. Graham opined that Ms. Chang's rejection of these roof panels was unreasonable. Mr. Millsaps testified that he never saw a panel that he felt was damaged or required replacing. His opinion was that unless it affects the integrity of the roof it should not be replaced. *See* TR. pp. 94-120. He did concede that the aesthetic requirements of the contract called for touch-ups on the roof panels for rust spots, etc. *See* Id. Mr. Knapp stated that replacement of a roof panel would be appropriate if one of two conditions were present. First a panel should be replaced if the defect affects the

functionality of the sheet. Second, if there is a cosmetic problem or visual deformity, the panel would also need to be replaced. *See* TR. pp. 204-206. He noted that in general it was unusual to have that many replaced on a project. *See Id.*

Jimenez's allegations of being forced to replace, as opposed to repair, certain panels are untenable. In several of the site reports from Ms. Chang, she suggests repairs be made to panels with rust spots or that other deformed panels be repaired or replaced. *See* DOL-6, T. 4 (November 1996); DOL-6, T. 3 pp. 1-4 (October 1996); AF-1, T. 5 pp. 81-87. Some of these rejections were due to mishandling and sent back; others were due to damage on site. *See Id.*

The expert testimony on the roofing panels by Jimenez's own witnesses is that the roof panels are susceptible to damage if improperly handled or installed. In this case, there are several instances whether either Jimenez did not schedule enough men for the installation or its subcontractor failed to provide the labor necessary to handle the panels. *See* TR. pp. 145-160. This makes it more likely that panels would be damaged during installation. *See Id.* Additionally, there was some replacement required because of the installation of the new roof curbs. *See Id.* Since Jimenez could have notified government earlier than it did, this Court finds that the panel damage might have been lessened. Taken together, Jimenez's on site witnesses, while conceding that some roof panels were damaged enough to reasonably replace or touch up, failed to sufficiently articulate a specific number of the panels that were unreasonably rejected and replaced. Jimenez has failed to sufficiently prove either that Ms. Chang's rejections of the roofing panels were unreasonable or that they were the proximate cause of the delay. Therefore, in the absence of contradicting evidence, while Ms. Chang's reports did contain a high number of roof panel replacements, this Board concludes that her inspections represented a strict but reasonable interpretation of the requirements for the roof panels. In fact, the evidence suggests that the majority of the rejections of the damaged roof panels were sufficiently attributable to mishandling in the delivery, mishandling onsite, or premature installation. As such, Jimenez has failed to prove that the delay an excess costs caused by replacing the roof panels was attributable to the government.

Neoprene Closures

Jimenez also asserts that Ms. Chang's aesthetic requirements for the neoprene closures were unreasonable and contributed to excess costs and delay. First, this Court notes that Jimenez was compensated for the excess cost of the neoprene additions through a modification to the contract. *See* AF-1, T. 10. Therefore, the only issue regarding the closures is whether it caused delay in the contract performance and whether that delay was attributable to the government.

Under the contract, the roofing accessories are required to match the roof panels. AF-1, T. 10 p. 11. §07414, ss. 2.4 requires that:

Sheet metal flashings, gutters, downspouts, trim, moldings, closure strips, pre-formed crickets, caps, equipment curbs, and other similar sheet metal accessories used in conjunction with preformed metal panels shall be of the same materials as used for

the panels. Provide metal accessories with a factory color finish to match the roofing panels. *See Id.*

Therefore, Ms. Chang, during her inspections, was entitled to require that the black neoprene closures be adjusted to match the roof panels. According to Mr. Diamantidis, the architect/consultant for the Contracting Officer, it was not unusual to require these closure to match the roof panels. *See TR. 410-415.* In fact, he testified that these items should have coordinated with the roof panels. *See TR. 410-415.* This Court takes his testimony as determinative on the issue along with the contract requirements and concludes that any delay caused by Jimenez in conforming with the above contract requirement was due to its own inability to secure the type of closure that would coordinate with the roof panel consistent with the contractual requirements. Therefore, the delay caused by Jimenez's manufacture of the matching closures is not attributable to the Government.

II. LIQUIDATED DAMAGES

In this case, the Government submitted a counterclaim for liquidated damages. Specifically, it claims entitlement to \$40,300.00 based on Jimenez's late performance in the amount of 200 days from the original substantial completion date under the contract.

The liquidated damages provision of the contract at issue provides that:

(a) If the Contractor fails to complete each separate part or stage of the work within the time specified in the contract for that part or stage, or any extension, the Contractor shall pay to the Government as liquidated damages the following amounts:

Liquidated Damages for each day of delay From Substantial Completion of the Project as specified in Attachment B – Additional Instructions to Bidders, “Period of Performance”	<u>\$200.00/day</u>
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48 C.F.R. §52.211-12, Alternate I (Apr 1984)

By accepting the Notice to Proceed on May 2, 1996, Jimenez established a substantial completion date of August 8, 1996 and a final closeout date of October 3, 1996. *See AF-1, T. 5 pp. 131-139.*

Jimenez implies that it was unaware that the substantial completion date was August 8, 1996 and infers that the assessment date for liquidated damages was represented to Jimenez as October 3, 1996. It argues first that on that date the buildings were fit for their intended purpose, which Jimenez defined as occupancy. Second, Jimenez states that the delay in completion of the project after that date was due to the installation of the roof curbs and correction of the government's design

defect..

As an initial matter, this Board finds that the substantial completion date of August 8, 1996, not October 3, 1996 was sufficiently communicated to Jimenez through the solicitation documents, the preconstruction meeting, and subsequent correspondence. As stated previously, this Board found that Jimenez, along with all potential bidders, received a complete set of solicitation documents, which contained the requirement for a substantial completion date. *See* Footnote 2. According to Ms. Chang's report of the pre construction meeting, this substantial completion date was given. *See* AF-1, T. 5 pp. 131-139. This meeting was attended by representatives of Jimenez, as well as the Architect-Engineer and Ms. Chang, the Project Manager. *See Id.*

During the months following this meeting, it became apparent to Ms. Chang that the project was not progressing at a rate consistent with Jimenez's submitted performance schedule. Therefore, she issued a cure letter on August 6, 1996 to Jimenez, reminding the company of the substantial completion date and warning of the onset of liquidated damages. *See* DOL-6, T.3 (August 1996); AF-1, T.4 pp. 46-47, 50-51. Jimenez responded and notified its subcontractors of the risk of liquidated damages if the project was not timely completed. *See Id.*; TR. pp. 124-125. At this time, a new performance schedule was submitted that would allow the project to be completed by October 3, 1996, the final close out date for the project. *See* AF-1, T.4, pp. 46-47. This documentation and correspondence refutes Jimenez's claim that it was unaware of a substantial completion date for purposes of liquidated damages. Therefore, this Board finds that the government was entitled to assert a claim for liquidated damages from August 8, 1996 and continuing until the project was substantially completed..

The final substantial complete date, is in dispute. Jimenez contends that the project was substantially complete on October 3, 1996, because the buildings were able to be occupied on that date. The Government contends that the project was substantially complete on February 26, 1997, because the Architect/Engineer certified the buildings' roofs as complete for their intended purpose with only minor punch list items.

Substantial completion occurs when a project is capable of being used for its intended purpose. Kinetic Builder's Inc. v. Peters, 226 F.3d 1307, 1315-1316 (Fed. Cir. 2000). Section G.16 of the instant contract defines substantial completion as, "the stage in construction when the project, or a designated portion thereof, has reached a state of completion which would permit the occupancy *and/or* use by the Department of Labor for its intended purpose." AF-1, T. 10 p. G-9 (§G.16) (emphasis added).

Mr. Graham, Jimenez's site superintendent, testified that in October, 1996, when he came onsite, the roof project was complete except for the leaks. *See* TR. 146-155. However, he conceded that the roof components, specifically the closures, would not serve the purpose that they were intended to serve. *See Id.* The Board also notes that there were significant punch list items to be completed during October 1996, involving both the roof panels and the curbs. *See* AF-1, T. 5 pp. 84-88; 91-94. Therefore, we find that the project was not substantially completed in October 1996.

After considering the contractual provision relating to substantial completion, the Board also finds that mere occupancy of the buildings in question did not constitute substantial completion of the contract. Based on that finding, the project was substantially complete when the roofs and their components were both essentially watertight, fit for occupation, and certified as such by the Architect/Engineer on February 26, 1996. AF-1, T. 5 pp. 66-72. After this date, the punch list items, according to the Architect/Engineer, were relatively minor and did not affect the intended purpose of the roof system. *See* AF-1, T. 5 pp. 62-66. Considering this substantial completion date, Jimenez would be responsible under the contract for liquidated damages from August 8, 1996, the initial substantial date to February 26, 1996, the actual substantial completion date. This represents 202 days of delay total.

However, this Board finds that Jimenez is not responsible for demonstrated periods of excusable delay. As previously discussed, the excusable delay in this case would be those periods of time attributable to the defective designs/specifications involving the roof curbs. After considering the evidence, this Court finds that the period delay solely attributable to roof curbs, with no concurrent delay on the part of Jimenez, began on November 11, 1996, the date the new roof curb drawings were approved. Prior to that date, it is impossible to ascertain the extent of the Government's design defect, because Jimenez also contributed to the delay through late submittals, poor scheduling and below average performance on the part of its subcontractors. This also resulted in the Government reduction in payment in October 1996, which this Board finds was reasonable given the lack of notice on the design defect, significant punch list items, and slow progress. *See* AF-1, T. 6 pp. 161-171. However, after the curbs were approved, Ms. Chang, the Project Manager, reported a good faith effort to speed up performance. *See* TR. pp. 312-315; AF-1, T. 5 pp. 57-83. Therefore, the evidence indicates that the time period for ordering and correctly installing the new roof curbs was excusable delay, attributable to the Government's design defect involving the roof curbs. Therefore, Jimenez is only responsible for liquidated damages from August 8, 1996 through November 11, 1996, which represents 95 days of inexcusable delay.

CONCLUSION

Jimenez presented an itemized list of its expenses and those of its subcontractors in the current REA. *See* AX-104. These expenses total \$105,872.15. Consistent with the above findings, this Court finds that Jimenez is entitled to a partial equitable adjustment for those expenses incurred with proper notice to the Government. These expenses include costs associated with the roof curbs and performance costs after November 11, 1996, the date the Government was sufficiently put on notice of the design defect. Since most of Jimenez's delays were due to its own actions, such as improper scheduling and failure to promptly notify the Government of design problems, it is not entitled to the \$8,946.21 for labor costs entitled "impact unabsorbed overhead and loss productivity." *See* AX-104, T.1, 2. It is entitled to all other expenses listed in the expense report, including direct labor cost, etc, with the exception of the expense for the 65 roof panels ordered. *See* *Id.* This Court previously found that Jimenez failed to prove that the Government improperly rejected roof panels on the project. Therefore, the expense, \$6,763.01 will not be allowed. Additionally, the ICS claim will be allowed in its entirety. The ACI claim will be allowed in its entirety. Therefore, Jimenez is

entitled to an equitable adjustment in the amount of \$90,162.93.

Pursuant to the liquidated damages clause, the Government is entitled to liquidated damages in the amount of \$19,000.00 less the \$100.00 already retained for such purpose. This represents 95 days of inexcusable delay at the cost of \$200.00 per day .

SO ORDERED.

ON BEHALF OF THE BOARD.

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RICHARD D. MILLS

Administrative Law Judge

Labor Board of Contract Appeals